Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

Anton Tittjung,

Petitioner

v.

Janet a Reno, as Attorney General
of the United States, and the
Immigration and Naturalization Service,

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under U.S. law, does the Attorney General have the discretion to abbreviate a non-citizen's right to a full and fair deportation hearing before the Immigration Judge, substituting in its place the judgment of a district court in a proceeding which did not reach the issue of deportability, and curtailing what Congress has said is the non-citizen's privilege to counsel and his right to examine the Government's evidence and to cross-examine its witnesses in addition to presenting evidence on the non-citizen's behalf, especially when Congress has also stated that the procedure prescribed by Congress shall be the sole and exclusive procedure for determining whether the non-citizen should be deported from the United States.

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. *See* Supreme Court Rules 14.1(b) and 29.6.

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INTRODUCTION

Petitioner, Anton Tittjung, hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Pursuant to the Holtzman Amendment, 8 U.S.C. § 1227(a)(4)(D) (formerly 8 U.S.C. § 1251(a)(4)(D), requiring the deportation of aliens who assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion under the direction of, or in association with, the Nazi government of Germany, Petitioner has been ordered deported to Croatia.

The Court of Appeals for the Seventh Circuit affirmed the decision of the Board of Immigration Appeals, ("BIA" or "Board"), denying Petitioner's motion for reconsideration of the Board's dismissal of Petitioner's appeal to it of the decision of the Immigration Judge, ("IJ"), ordering that Petitioner be deported to Croatia. The IJ, applying the doctrine of collateral estoppel, found Petitioner deportable based upon the judgment of the District Court for the Eastern District of Wisconsin which had denaturalized Petitioner. Petitioner submits that the IJ's decision and application of the doctrine of collateral estoppel violates Petitioner's fundamental right to a full and fair deportation hearing as required by Congress and as set forth in the agency's own regulations, and, respectfully, requests review by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, affirming the decision of the Board, is set forth as appendix A, and at 199 F.3d 393 (7th Cir. 1999). The opinion of the Board is set forth as appendix B. The opinion of the IJ is set forth in ppendix C. The decision of the Court of Appeals for the Seventh Circuit, denying rehearing, is set forth as Appendix D. The decision of the Board, denying reconsideration is set forth as appendix E. The decision of the Court of Appeals for the Seventh Circuit dismissing Appeal No. 97-3790 is attached ad appendix F.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 2, 1999. Petitioner petitioned the Court of Appeals for rehearing on January 18, 2000. The Court of Appeals issued its decision denying rehearing on February 9, 2000. This Court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1101, *et seq.*), ("INA"), provides:

> "In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

8 U.S.C. § 1229a(c)(3)(A). The INA further provides:

> "At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing."

8 U.S.C. § 1229a(c)(1)(A). The INA also provides:

> "(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
>
> (B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act, and
>
> (C) a complete record shall be kept of all testimony and evidence produced at the proceeding."

8 U.S.C. § 1229a(b)(4). Finally, the INA provides:

> "Unless otherwise specified in this Act, a

> proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."

8 U.S.C. § 1229a(a)(3).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a petition for writ of certiorari for review of a decision by the Court of Appeals for the Seventh Circuit, affirming a decision by the Board denying reconsideration of dismissal of Petitioner's appeal of the IJ's decision applying collateral estoppel to bar Petitioner from litigating whether he should not be deported and ordering that Petitioner be deported to Croatia.

B. Procedural Status.

Deportation proceedings in this matter commenced when the Immigration and Naturalization Service, ("Service"), issued and filed an Order to Show Cause, ("OSC"), alleging that Petitioner was deportable on three grounds: (a) alleged participation in Nazi persecution; (b) alleged excludability at admission into the U.S.; and (c) alleged presence in the U.S. in violation of U.S. law. Appendix C at 3.

The IJ granted the Service's motion for summary judgment, applying the doctrine of collateral estoppel, and finding that the evidence adduced during the denaturalization proceeding before the district court was sufficient to sustain the

Service's burden to establish petitioner's deportability by clear, unequivocal and convincing evidence. Appendix C at 11.

Petitioner appealed to the Board which affirmed the IJ's decision. Appendix B at 1. Petitioner moved the Board's reconsideration of its decision affirming the IJ's decision, which the Board eventually denied. Appendix E at 2. Petitioner filed his petition for review in the Court of appeals for the Seventh Circuit.

C. Facts.

The IJ ordered petitioner deported on March 25, 1994. Appendix C at 11. Prior to that order, the IJ had granted summary judgment to the Service. Id. Prior to the deportation proceedings before the IJ the district court had denaturalized petitioner. *See United States v. Tittjung*, 753 F.Supp. 251 (E.D. Wis. 1990), *aff'd.*, 948 F.2d 1292 (7th Cir.), *cert. denied*, 505 U.S. 1222 (1992).

The district court, in *Tittjung, supra*, holds that it is unnecessary, during denaturalization proceedings, to address the issue of petitioner's alleged procurement of a visa by misrepresentation. *See Tittjung*, 753 F.Supp. at 257. Petitioner contested his deportability during proceedings before the IJ and denied that he had willfully misrepresented facts in obtaining his immigration status, in addition to seeking discretionary relief in the form of suspension of deportation and/or asylum, should the IJ find him deportable. Appendix C at 3, 7-8.

As an affirmative defense to the Service's allegations of petitioner's deportability based upon participation in Nazi persecution, petitioner argued that there was no evidence in the

record of petitioner's persecutory acts; that he was never inside any camp; nor that his conduct there, if any, was voluntary. Id.

The Service took the position that the denaturalization judgment established petitioner's deportability on all charges of the OSC and that the doctrine of collateral estoppel applied to curtail what the Service viewed as petitioner's efforts to relitigate issues the Service alleged had been decided in the denaturalization proceeding. Appendix C at 3-4.

Based upon the IJ's reading of *Schellong v. INS*, 805 F.2d 655, 658 (7th Cir. 1986), the IJ ruled that collateral estoppel applied to estop petitioner from any further litigation of the issue of his deportability because that issue had been litigated in district court in proceedings in which petitioner had been a party. Appendix C at 6. The IJ ruled also that the voluntariness of petitioner's service in the German Waffen-SS was irrelevant. Id.

The IJ dismissed the discrepancies petitioner raised about a camp survivor's description of the individual called Anton Tittjung whose description and physical characteristics differed substantially from those of petitioner. Appendix C at 8-9. The IJ ruled that to the extent the camp survivor accurately described petitioner, the survivor's statement was corroborative of the findings of the district court, however, to the extent that description was inaccurate, it lacked relevancy to the proceedings. Appendix C at 9.

The IJ also ruled that petitioner was precluded, as a matter of law, from the discretionary relief of either suspension of deportation, under former 8 U.S.C. § 1254(a), as one who ordered, incited, assisted or otherwise participated in the

persecution of others on account of one of the statutory bases. Appendix C at 11.

The Board, in reviewing he IJ's decision, held that it was not immediately clear whether the IJ had sustained all of the charges of the OSC, but that, on closer examination, the IJ had restricted his ruling to the prior judgment in district court. Appendix B at 6. The Board further held that the IJ had made no independent findings regarding petitioner's alleged procurement of a visa through fraud, and held also that such a finding by the IJ was unnecessary. Id.

Citing *Kairys v. INS*, 981 F.2d 937, 939 (7th Cir. 1992), the Board held that no unfairness was present in petitioner's case by operation of collateral estoppel because no procedural opportunities were available in deportation proceedings which had not been available in the denaturalization proceedings. Appendix B at 10. The Board adopted the IJ's ruling that petitioner was ineligible for asylum or withholding of deportation, and suspension of deportation.

The Board ruled that petitioner's motion to consider additional evidence not considered by the IJ, in effect a motion to remand, was denied because the new evidence, that petitioner had served as a camp guard under duress, would not have changed the result. Appendix B at 25. Petitioner filed a petition for review of the Board's decision in the Court of Appeals for the Seventh Circuit and later moved for voluntary dismissal which the Court of Appeals for the Seventh Circuit granted on November 26, 1997. Appendix F at 1.

Petitioner moved the Board to reconsider its dismissing of his appeal and its affirmance of the IJ's decision, which the

Board denied, finding "no legal argument or aspect of this case that was overlooked by the Board in our prior decision." Appendix E at 2-3. Petitioner then petitioned the Court of Appeals for the Seventh Circuit for review of the Board's denial of reconsideration.

On December 2, 1999, in a panel decision, the Court of Appeals for the Seventh Circuit affirmed the Board's decision. On January 18, 2000, Petitioner petitioned the pane for rehearing, which the panel denied on February 9, 2000.

REASONS FOR GRANTING THE PETITION

I. The petition should be granted because this case raises an important issue about whether the Attorney General is vested with the authority to modify the requirements which Congress has prescribed in procedures giving Petitioner a privilege and rights during a deportation hearing, under 8 U.S.C. §§ 1229a(b)(4), (c)(1)(A), and (c)(3)(A), and has stated, in 8 U.S.C. § 1229a(a)(3), and which Congress has stated shall be the sole and exclusive procedure for determining Petitioner's deportability.

The petition should be granted to clarify whether the Attorney General is vested with the discretionary authority to modify the procedure laid out by Congress in the INA as the sole and exclusive procedure by which a non-citizen can be found deportable, by applying the doctrine of collateral estoppel to estop Petitioner from exercising his rights under the INA's deportation-hearing procedures. Although courts have held that the doctrine of collateral estoppel is applicable in deportation proceedings, *see, e.g., Kairys*, 981 F.2d at 940, its correct

application can only be supported by a showing that the issue at stake in the deportation proceeding (1) is identical to the one in the prior litigation, (2) was actually litigated in the prior proceeding, and (3) was critical and necessary to the judgment in the prior litigation. *See Palciauskas v. INS*, 939 F.2d 963, 966 (11th Cir. 1991). Petitioner submits that this record is devoid of a showing by either the Court of Appeals for the Seventh Circuit, the Board or the IJ, that the district court which denaturalized Petitioner decided, or even reviewed, petitioner's deportability.

The issue before the district court was whether petitioner had obtained naturalization illegally. *See Tittjung*, 753 F.Supp. at 256. That issue is different from whether Petitioner is deportable. A clear indicator that it is is the fact that Congress placed those two processes in different sections of the INA. Analytically, the two issues are different. Denaturalization goes to whether a naturalized citizen should be stripped of his citizenship and does not address whether a that individual should be banished from the United States. A deportation hearing, on the other hand, is designed to determine whether a non-citizen should be banished from the United States.

The issue litigated in the denaturalization process was whether Petitioner, then a citizen of the United States, should have been naturalized. The issue in the deportation process is whether the Service can, by clear and convincing evidence, sustain its burden of proof on the issue of whether Petitioner is deportable. In addition, again in the deportation proceeding, Petitioner has the right to show cause why he should not be deported from the U.S. upon the allegations contained in the

OSC.

Courts have held that a non-citizen found deportable or one in deportation proceedings can seek affirmative relief from deportability prior to the IJ's decision. *See, e.g., Zamora-Morel v. INS*, 905 F.2d 833, 839 (5th Cir. 1990) [saying that a person can request discretionary relief from deportation at any time prior to the IJ entering an order of deportation]. This further distinguishes the deportation proceeding from the naturalization proceeding because there is no relief from denaturalization, once it is determined that a citizen should be denaturalized.

None of the evidence before the Court of Appeals for the Seventh Circuit, or anywhere else, supported the proposition that, in enacting 8 U.S.C. § 1451(a), the denaturalization provision of the INA, Congress intended to replace or supplant deportation proceedings under the INA. The express mandate to the IJ from Congress is that the IJ's decision must be based "only on evidence produced at the hearing." 8 U.S.C. § 1229a(c)(1)(A). A full and fair deportation hearing, therefore, is one which gives the non-citizen charged with deportability due process or the opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ["The fundamental requisite of due process of law is the opportunity to be heard."].

Similarly, Congress has mandated that a full and fair deportation hearing includes the non-citizen's privilege to be represented by counsel, and the right to examine the Government's evidence against him, as well as presenting evidence on the non-citizen's own behalf and cross-examining any witnesses the Government relies on to advance its deportability case against the non-citizen. *See* 8 U.S.C. §

1229a(b)(4)(A), and (B).

Interpreting the burden of proof which the Service must sustain to prove a non-citizen deportable, this Court has held that the Service is required to prove the truth of the allegations it makes in the OSC to support its case, by clear, unequivocal and convincing evidence, noting the importance and appropriateness of this standard because

> "The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores."

Woodby v. INS, 385 U.S. 276, 286 (1976). *Woodby* leaves no doubt about the fact that for a an order of deportation to be valid the allegations in the OSC must be proven to be true.

In this case, the issues to be determined at the deportation hearing before the IJ were framed by the Service in its allegations in the OSC issued on or about May 11, 1992, and whose allegations the IJ summarized as charging Petitioner

> "with deportability, in essence, for having assisted in the persecution because of race or religion, for being ineligible for his visa because of his service as a camp guard, and for willfully misrepresenting his wartime activities in his visa application."

Appendix C at 3.

The district court, in its findings, expressly declined to reach whether Petitioner had made misrepresentations in his

visa application. *See Tittjung*, 753 F.Supp. at 257. Moreover, the district court's judgment was that Petitioner's citizenship be revoked; that the January 9, 1974 order admitting Petitioner to citizenship be set aside, and that Petitioner's certificate of naturalization be canceled. *See Id.*

The proceeding before the district court, based upon that court's judgment, had a narrow focus that did not reach the issue of Petitioner's deportability. Although the purported facts would be the same, there is nothing in the statutes which suggests that the proceeding in Immigration Court, to determine deportability, can rely on a judgment, or even the record, in another court.

In addition, as the IJ improperly overruled Petitioner's attempts to introduce evidence not previously available to Petitioner and not presented to any fact finder, regarding discrepancies in a camp survivor's alleged description of Petitioner. Appendix C, at 8-9. The Court of Appeals for the Seventh Circuit has not explained why, if the Service is required in deportation proceedings to prove the truth of the allegations in the OSC, by clear, unequivocal and convincing evidence as this Court has held, Petitioner's right to present evidence which detracts from the Service's allegations in the OSC should be curtailed, especially when there are inconsistencies such as those pointed out to the IJ in survivor accounts.

At any rate, the Court of Appeals points to no authority which establishes that the burden of proof on the truth of the allegations of the OSC may be dispensed with once Petitioner, the respondent to the OSC, has been denaturalized. Therefore,

even accepting, *arguendo*, that Petitioner's denaturalizatio proceeding established certain facts upon which deportation could be based, the Court of Appeals did not explain how denaturalization could substitute for the express requirement that the truth of the allegations in the OSC be proven during the deportation hearing before an order that Petitioner be deported can be entered. *See Woodby*, 385 U.S. at 286.

This Court must rule on whether the Attorney General may, without Congress delegating that authority to her, modify a procedure which Congress has said is the sole and exclusive procedure by which a non-citizen can be found deportable, *see* 8 U.S.C. § 1229a(a)(3), to curtail the privilege to counsel and the right to present evidence in his favor and to cross-examine adverse witnesses which Congress has said a non-citizen charged with deportation has. *See* 8 U.S.C. §§ 1229a(b)(4), (c)(1)(A), and (c)(3)(A). The judgment of the Court of Appeals for the Seventh Circuit denies Petitioner substantial rights granted Petitioner under the statutes cited above, and such denial deserves this Court's review.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit conflicts with the congressional intent expressed in the provisions under 8 U.S.C. §§ 1229a(a)(3), (b)(4), (c)(1)(A), and (c)(3)(A), in that it denies Petitioner a privilege and rights guaranteed thereunder, during deportation proceedings. Accordingly, Petitioner, respectfully, requests that this Petition for a Writ of Certiorari be granted.

Dated this 10th day of May, 2000.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3407
ANTON TITTJUNG,

Petitioner,

v.

JANET RENO, U.S. Attorney General, and the
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition for Review
From the Board of Immigration Appeals
No. A08 315 083

ARGUED NOVEMBER 5, 1999—DECIDED DECEMBER 2, 1999

Before BAUER, FLAUM, and EASTERBROOK, *Circuit Judges.*

FLAUM, *Circuit Judge.* The Immigration Court ordered that Anton Tittjung be deported to Croatia, pursuant to the Holtzman Amendment, 8 U.S.C. § 1227(a)(4)(D) (formerly 8 U.S.C. § 1251(a)(4)(D)), which requires the deportation of aliens who assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion under the direction of, or in association with, the Nazi government of Germany. The

Board of Immigration Appeals (BIA) affirmed the deportation order and dismissed Tittjung's appeal. Tittjung filed a motion for reconsideration, which the BIA denied. Tittjung now petitions this Court to review the BIA's denial of his motion for reconsideration. For the reasons stated below, we affirm the decision of the BIA.

Background

Tittjung was born in Erdud, Yugoslavia (now part of the Republic of Croatia) on November 17, 1924.[1] He joined the Waffen SS, an organization of the Nazi government of Germany, in October 1942 and remained in the Waffen SS until the conclusion of World War II in 1945. Tittjung was a member of the SS *Totenkopf-Sturmbann* (Death's Head Battalion), a collection of units with primary responsibility for guarding concentration camps and implementing the Nazi policy of persecuting Jews and other targeted groups. While a member of the SS Death's head Battalion, Tittjung served as an armed guard at the Mauthausen concentration camp and its subcamp at Gross Raming, in Nazi-occupied Austria.

Mauthausen and is subcamp Gross Raming were places of persecution. Jews and others were imprisoned there because of their race, religion, national origin, or political opinion. During the period of Tittjung's service, thousands of

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[1]These background facts are laid out in greater detail in the opinion by the District Court for the Eastern District of Wisconsin, in Tittjung's prior denaturalization proceeding. *United States v. Tittjung*, 753 F.Supp. 251, 252-55 (E.D. Wis. 1990).

prisoners died in Mauthausen and Gross Raming as the result of shooting, gassing, forced labor, and other forms of killing.

As a member of the SS Death's Head Battalion at Mauthausen, Tittjung's duties included ensuring that prisoners performed forced labor and did not escape, as well as guarding prisoners on forced marches. Guards were armed and were under orders to shoot any prisoners who tried to escape. While performing their duties, members of the SS Death's Head Battalion ordered, incited, assisted, and generally participated in the persecution of prisoners because of their race, religion, or national origin.

In 1952, Tittjung applied for and obtained a visa to enter the United States pursuant to the Displaced Persons Act of 1948 ("DPA"). At no point during the application process did Tittjung disclose his association with the SS Death's Head Battalion or his participation in Nazi persecution as a concentration camp guard. In 1973, Tittjung applied for naturalization, again concealing his service as an armed concentration camp guard. Tittjung was granted U.S. citizenship on January 9, 1974.

In September, 1989, the Government brought an action in the United States District Court for the Eastern District of Wisconsin, seeking to revoke Tittjung's citizenship. The complaint alleged that Tittjung was ineligible for U.S. citizenship because of his SS Death's Head Battalion guard service at Mauthausen and Gross Raming, and because he misrepresented and concealed his wartime activities to immigration and naturalization officials, thereby procuring his citizenship illegally.

Following a trial on the merits, the district court found that the Government proved by clear, unequivocal, and convincing evidence that Tittjung had served as an armed guard at Mauthausen and Gross Raming. The district court held that as a concentration camp guard, Tittjung assisted in the persecution of persons because of their race, religion, or national origin, and was there ineligible for a visa under the DPA when he entered the United States. Because Tittjung had not legally entered the United States, his citizenship was unlawfully procured and the district court revoked it. *United States v. Tittjung,* 753 F.Supp. 251, 256-57 (E.D. Wis. 1990). Because Tittjung's guard service required his denaturalization as a matter of law, the district court did not address the allegation that Tittjung misrepresented his service to visa officials and thereby entered the United States by means of fraud. *Id.* at 257. This Court affirmed the district court's denaturalization order in an opinion dated November 14, 1991, 948 F.2d 1292 (7th Cir. 1991), and the Supreme Court thereafter denied certiorari, 505 U.S. 1222 (1992).

On May 11, 1992, the Government commenced deportation proceedings before the Immigration Court against Tittjung, raising three bases for deportation: (1) that, as a guard at Mauthausen concentration camp, Tittjung assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion under the direction of or in association with, the Nazi government of Germany, in violation of the Holtzman Amendment, 8 U.S.C. § 1251(a)(4)(D) (now codified as 8 U.S.C. § 1227(a)(4)(D)); (2) that, insofar as he was ineligible for a visa under the DPA, he was excludable at the time of his entry into the United States, 8 U.S.C. § 1251(a)(1)(A) (now

codified at 8 U.S.C. § 1227(a)(1)(A)); and (3) that he was present in the United States unlawfully, in violation of 8 U.S.C. § 1251(a)(1)(B) (now codified as 8 U.S.C. § 1227(a)(1)(B)).

The Government moved for summary judgment and an order of deportation, based upon the application of the doctrine of collateral estoppel to facts—in particular, Tittjung's wartime service as an armed concentration camp guard—established in the denaturalization trial. The Government submitted portions of the denaturalization trial record, which included documentary evidence and expert testimony. On March 24, 1994, the Immigration Court granted the Government's motion and ordered that Tittjung be deported pursuant to the Holtzman Amendment. Having reached this conclusion, the Immigration Court did not resolve whether Tittjung was deportable under any misrepresentation theory. Tittjung declined to designate a country of deportation, so the Immigration Court designated Croatia, the country having present jurisdiction over Tittjung's place of birth. The Immigration Court also held that under the Holtzman Amendment, Tittjung was statutorily ineligible for relief from deportation.

Tittjung appealed the decision of the Immigration Court to the BIA. On August 13, 1997, the BIA affirmed the deportation order and dismissed Tittjung's appeal. On September 17, 1997, Tittjung filed a motion for reconsideration with the BIA. On November 5, 1997, while the motion for reconsideration was pending before the BIA, Tittjung filed a petition for review by this Court, seeking review of the BIA's decision affirming the deportation order.

Tittjung thereafter filed a motion to dismiss his petition for review, which this Court granted on November 21, 1997.

On August 27, 1998, the BIA denied Tittjung's motion for reconsideration. On September 24, 1998, Tittjung filed the instant petition for review, seeking review by this Court of the denial of his motion for reconsideration.

Discussion

"The decision to grant or deny a motion to reopen or reconsider is within the discretion of the [BIA], subject to restrictions of this section." 8 C.F.R. § 3.2. We review the BIA's decision to determine whether it was a proper exercise of discretion. This Court's review is limited to those issues that Tittjung presented to the BIA in his motion for reconsideration. Jurisdiction does not attach to other matters relating to the underlying deportation order, which Tittjung has failed to appeal. *Chudshevid v. INS*, 641 F.2d 780, 784 (9th Cir. 1981); *see also Akrap v. INS*, 966 F.2d 267, 270-71 (7th Cir. 1992).

The only issues that Tittjung presented to the BIA in his motion for reconsideration are: (1) whether the BIA's decision was erroneous in that it failed to address that the deportation statute requires that the Government prove Tittjung's fraud or willful misrepresentation of a material fact to procure a visa, which the Government failed to do; and (2) whether Tittjung's deportation should be deferred or

suspended for humanitarian reasons. We address each of these arguments in turn.[2]

A.

Tittjung alleges that the Immigration Court and the BIA erred in ordering him deported because they failed to reach the issue of whether he misrepresented his concentration camp guard service when he applied for a visa to enter the United States. Having established through application of collateral estoppel the fact that Tittjung served as an armed, SS Death's Head Battalion guard at a Nazi-operated concentration camp, the Immigration Court and the BIA concluded that Tittjung was deportable under the Holtzman Amendment. Tittjung argues that this conclusion was erroneous in light of this Court's decision in *Schellong*, 805 F.2d 655 (7th Cir. 1986), which Tittjung reads as standing for the proposition that the Holtzman Amendment requires that

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[2]In his brief, Tittjung attacks the general application of collateral estoppel by the Immigration Court and the BIA to issues litigated and decided in the prior denaturalization proceedings. Tittjung did not raise this argument in his motion for reconsideration before the BIA, and it is therefore outside the scope of our review. Even if we were to review it, this argument lacks any merit. This Court has repeatedly held that the doctrine of collateral estoppel is applicable in deportation proceedings such as this. *See Kairys v. INS*, 981 F.2d 937, 939 (7th Cir. 1992) ("Given the full and fair judicial hearing to which an alien is entitled in a denaturalization proceeding, there is no reason not to apply the doctrine of collateral estoppel in a subsequent deportation proceeding to bar the relitigation of facts actually litigated and necessarily determined."); *Schellong v. INS*, 805 F.2d 655, 658 (7th Cir. 1987) (upholding the application of collateral estoppel in a deportation proceeding where the alien had been denaturalized based upon his service as an armed Nazi concentration camp guard).

the Government prove misrepresentation or fraud. This reading of *Schellong* is flawed and Tittjung's argument is baseless.

Simply put, the Holtzman Amendment does not contain a fraud element. Misrepresentation is not a requirement for deportation under that act. The act mandates deportation of any alien who: "during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with [the Nazi government of Germany and government allied with or controlled by it] ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion . . . ." 8 U.S.C. § 1182(a)(3)(E); 8 U.S.C. § 1227(a)(4)(D). This Court has stated on several occasions that the Holtzman Amendment provides a grounds for deportation separate from the issue of whether the individual misrepresented his wartime activities to immigration authorities. *See Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993); *Kulle v. INS*, 825 F.2d 1188, 1194 (7th Cir. 1987). The portion of our decision in *Schellong* that Tittjung points to as stating otherwise does not even discuss the Holtzman Amendment. In that case, the Government had pressed for Schellong's deportation on two grounds: a misrepresentation theory under Section 1251(a)(2) and an assistance in persecution theory under the Holtzman Amendment. The portion of *Schellong* that Tittjung relies on comes from language discussing the misrepresentation ground. In the section that does address the Holtzman Amendment, *Schellong* explicitly states that this statute provides "an additional independent ground of deportation," aside from

any allegations of misrepresentation. *Schellong v. INS*, 805 F.2d 660.

In this case, the Immigration Court and the BIA never reached the issue of misrepresentation because, having found Tittjung deportable on an assistance in persecution theory under the Holtzman Amendment, they declined to reach an adjudicate alternative grounds. Tittjung's service as an armed SS Death's Head Battalion concentration camp guard was conclusively established in the denaturalization trial.[3] *United States v. Tittjung*, 753 F.Supp. 251, 253 (E.D. Wis. 1990). That fact having been established, the BIA was entirely correct in affirming his deportation, as this Court has consistently held that Nazi concentration camp guards assisted in persecution within the meaning of the Holtzman Amendment. *See Kairys v. INS*, 981 F.2d at 942-43; *Kulle v. INS*, 825 F.2d at 1192-93; *Schellong v. INS*, 805 F.2d at 661.

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[3]Tittjung argues in his brief that the Immigration Court refused to consider new evidence not previously presented before any fact finder. Specifically, he points to a statement by a former prisoner of the Mauthausen concentration camp that Tittjung argues is exculpatory. Tittjung did not raise this issue in his motion for reconsideration, and hence the argument is not properly before this Court. Even if it were, the Immigration Court and the BIA more than adequately considered Tittjung's claim. They concluded, after reviewing the record and Tittjung's proposed proffer, that the new evidence was, if anything, inculpatory. Such finding of the BIA in this regard are entitled to substantial deference, *see Bradvica v. INS*, 128 F.3d 1009, 1012 (7th Cir. 1997), and we find no reason based on our own review of the record to now call into question the application of collateral estoppel to the facts established in the prior proceedings.

B.

Tittjung also asserts that the BIA did not address the request in his reconsideration motion for relief from deportation for "humanitarian reasons" relating to his health. However, this claim was fully considered by the BIA during Tittjung's appeal of the deportation order. The BIA correctly held that, as an alien deportable under the Holtzman Amendment, Tittjung was statutorily ineligible for such relief. 8 U.S.C. § 1253(h)(2)(A) (now codified at 8 U.S.C. § 1229b(c)(4)). Inasmuch as Tittjung is barred by statute from discretionary relief, the BIA did not abuse its discretion in denying his motion for reconsideration on this issue.

Tittjung's reference to the Sixth Circuit's decision in *Petkiewytsch v. INS*, 945 F.2d 871 (6th Cir. 1991), is unpersuasive. In *Petkiewytsch*, the Sixth Circuit granted relief from deportation under the Holtzman Amendment after deciding that deporting the individual would "carry out no discernible policy of the United States." *Id.* at 881. The BIA emphasized the many factual distinctions between Petkiewytsch's and the instant case in a rejecting previous argument by Tittjung, that deportation under the Holtzman Amendment requires a showing of personal involvement in atrocities, which eh also based on language in *Petkiewytsch*.[4] (BIA Op. At 10-12). Furthermore, the application of *Petkiewytsch* to this case would conflict with the law of this

[4]Unlike the instant case, for example, *Petkiewytsch* involved an individual who was involuntarily conscripted into a labor education camp. This Court has previously distinguished Petkiewytsch along these factual lines in applying the Holtzman Amendment. *See, e.g., Kairys*, 981 F.2d 942-43.

Circuit. In *Schellong*, we explained that the purpose of the Holtzman Amendment is to exclude from the United States individuals who along with the Nazis "had inflicted suffering on persons because of their race, religion or political opinion. . . . [I]ndividuals who, armed with guns, held prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression." And in *Kairys*, we further explained:

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

981 F.2d at 943. Tittjung's case falls squarely within the mandate of the Holtzman Amendment and the BIA properly deemed him ineligible for the relief he seeks.

Conclusion.

For the reasons stated above, we AFFIRM the BIA's denial of Tittjung's motion for reconsideration.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

U.S. Department of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A08 315 083 - Chicago Date: AUG 13, 1997

In re: ANTON TITTJUNG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

William T. Regas, Esquire
123 South Northwest Highway
Park Ridge, Illinois 60068

ON BEHALF OF SERVICE:

Betty-Ellen Shave
Senior Trial Attorney
Office of Special Investigations
Criminal Division
Department of Justice

CHARGE:

Order: Sec. 241(a)(2)(A), I&N Act [8 U.S.C. §1251(a)(1)(A)] - Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(4)(D)] - In the United States in violation of law

Sec. 241(a)(4)(D), I&N Act [8 U.S.C. § 1251(a)(4)(D)] - Participated in Nazi persecution

APPLICATION: Termination of proceedings; remand

In a decision dated March 25, 1994, the Immigration Judge found the respondent deportable under sections 241(a)(1)(A), (B), and (4)(D) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1)(A), (B), (4)(D), and ineligible for any form of relief from deportation, including asylum under section 208 of the Act, 8 U.S.C. § 1158, and suspension of deportation under section 244(a) of the Act, 8 U.S.C. § 1254(a). On May 18, 1994; the Immigration Judge ordered the respondent deported from the United States to Croatia. The respondent appealed and requested oral argument. The request was granted, and oral argument was heard on January 24, 1995. The appeal will be dismissed.

I. PROCEDURAL HISTORY

The respondent is a 72-year old ethnic German ("Volksduetscher") and native of Croatia. He initially entered the United States on May 24, 1952, as an immigrant pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950) ("DPA"). He subsequently reentered the United States on August 31, 1955, as a returning immigrant. On January 9,

1974, the respondent became a naturalized citizen of the United States.

A. Denaturalization

In 1989, the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of Wisconsin, alleging that he had served as an armed guard with the Waffen-SS Totnkopf Sturmbann ("Death's Head Battalion") at a concentration camp and therefore had procured his citizenship illegally. At a 3-day trial that commenced on October 31, 1990, the Government presented, inter alia, an SS-prepared roster dated July 26, 1944, which listed the guards stationed at the Gross Raming subcamp of the Mauthausen concentration camp. The roster included, at entry 100, the respondent's name, his rank, his date of birth, and his parents' pace of residence. The respondent declined to testify and did not offer any other evidence. On December 14, 1990, the district court entered an order revoking the respondent's citizenship and canceling his certificate of naturalization. United States v. Tittjung, 753 F.Supp. 251 (E.D. Wisc. 1990), aff'd, 948 F.2d 1292 (7th Cir. 1991), cert. denied, 505 U.S. 1222 (1992).

In its decision, the district court found that the guard roster was authentic and clearly and convincingly established that the respondent was an armed concentration camp guard. Id. at 256. The district court observed that in Fedorenko v. United States, 449 U.S. 490 (1981), the Supreme Court held that all concentration camp guards were ineligible for visas as a matter of law for having "assisted in the type of persecution proscribed by the DPA." Id. at 257. The district court

therefore concluded that, as an armed concentration camp guard, the respondent was ineligible for his visa under sections 2 and 13 of the DPA and, thus, procured his citizenship illegally. Id. at 254, 256-57.[1]

B. Charges of Deportability

An Order to Show Cause was issued on May 11, 1992, charging the respondent with deportability under section 241(a)(4)(D) of the Act, otherwise known as the "Holtzman Amendment," as an alien who assisted the Nazi government of Germany in the persecution of persons because of their race, religion, national origin, or political opinion during the period beginning on March 23, 1933, and ending on May 8, 1945. The respondent was also charged with deportability under section 241(a)(1)(A) of the Act, as an alien who was within a class of aliens excludable under the law existing at the time of his 1952 entry, namely: (1) sections 2 and 10 of the DPA, because as one who assisted the Nazis in persecuting civilians, he did not qualify as a "displaced person"; (2) section 10 of the DPA, because he made a willful misrepresentation for the purpose of gaining admission to the

[1]Section 2(b) of the DPA provided: "'Displaced person' means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I of the International Refugee Organization ("IRO") Constitution, in turn, excluded from the definition of "refugee or displaced person" any person who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Section 13 of the amended DPA specified that "[n]o visas shall be issued . . . to any person who advocated or assisted in the persecution of any person because of race, religion or national origin."

United States as an eligible displaced person; and (3) section 13 of the DPA, because he advocated or assisted in the persecution of any person because of race, religion, or national origin. Lastly, the respondent was charged with deportability under section 241(a)(1)(B) of the Act, as an alien who entered the United States in 1952 in violation of sections 2, 10, and 13 of the DPA, and then reentered in 1955 and remained in violation of section 212(a)(19) of the Act, 8 U.S.C. § 1182(a)(19), which exclude aliens for fraud or willful misrepresentation of a material fact, and section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(20), which excluded any immigrant who was not in possession of a valid immigrant visa.

The respondent admitted the allegations regarding his nationality, the fact of his admission in 1952 pursuant to the DPA, and the revocation of his citizenship, but he denied the fraud-related allegations and denied each of the charges of deportability. Alternatively, he requested an opportunity to apply for suspension of deportation and asylum, though neither of these forms of relief is available to an alien who is deportable for having assisted in Nazi persecution.

The Government moved for summary judgment on two separate bases. First, the Government argued, in essence, that the doctrine of collateral estoppel should be applied to the denaturalization judgment to bar relitigation of the factual and legal issues pertaining to the respondent's wartime service as an armed concentration camp guard, which would establish that he assisted Nazi persecution for the purposes of

both the DPA and section 241(a)(4)(D) of the Act.[2] Second, the Government argued that an independent review of the evidence included in the record of the denaturalization proceeding would demonstrate the respondent's deportability on all of the charges set forth in the Order to Show Cause, including those relating to his alleged immigration fraud. The respondent opposed the motion, arguing that the use of collateral estoppel would be unfair in his case because of new evidence and that the record of the denaturalization proceeding introduced by the Government was incomplete. He requested discovery and a "trial."

C. The Immigration Judge's Decision

The Immigration Judge granted the Government's motion for summary judgment, but at first glance, it is not entirely clear whether he sustained all of the charges of deportability, or just those that the denaturalization judgment would support. In his decision, the Immigration Judge overruled the respondent's objections to the record of the denaturalization proceeding and admitted it into the evidence. He subsequently indicated that his finding of deportability was based in part on that record.

Nevertheless, a closer examination of the decision reveals that the Immigration Judge limited his factual and legal conclusions regarding the respondent's deportability to those

[2]The Government also indicated that the doctrine of collateral estoppel should be applied to bar relitigation of the facts regarding the respondent's nationality and immigration to the United States pursuant to the DPA, but as noted above, these facts are not in dispute.

issues determined by prior judgment. For instance, in his actual discussion of the respondent's deportability, the Immigration Judge only referred to evidence from the denaturalization proceeding when considering whether to apply the doctrine of collateral estoppel in light of the new evidence present. Thus, implicit in the Immigration Judge's decision is a finding that, through the use of collateral estoppel, the Government established the respondent's wartime service as an armed concentration camp guard, which rendered him deportable under sections 241(a)(1)(A), (B), and (4)(D) of the Act as an alien who assisted in Nazi persecution for purposes of the DPA and the Act. We emphasize that the Immigration Judge made no independent findings regarding the respondent's alleged immigration fraud. We further emphasize that no such findings were necessary, because respondent's ineligibility for his visa under the DPA as one who assisted Nazi persecution, if properly established, would amply support the order of deportation in this case.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL

The doctrine of collateral estoppel precludes a party from relitigating issues that were actually litigated and necessary to the outcome of a prior suit. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); Matter of Fedorenko, 19 I&N Dec. 57, 61 (BIA 1984). The doctrine serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co., Inc. v. Shore, supra, at 326. Thus, it may be applied to preclude litigation of both

issues of law and issues of fact, provided those issues were conclusively determined in the prior suit. Schellong v. United States, 805 F.2d 655, 659 (7th Cir. 1986); Frye v. United Steelworkers of America, 767 F.2d 1216, 1220 (7th Cir. 1985); Matter of Fedorenko, supra, at 67. In deportation proceedings, the application of the doctrine is appropriate where the alien was a party to the prior proceeding; the alien was a given a full and fair opportunity to litigate in the prior proceeding; and the use of collateral estoppel is not unfair. Schellong v. INS, supra, at 658-59; Matter of Fedorenko, supra, at 61, 63-64; see also Kairys v. INS, 981 F.2d 937 (7th Cir. 1992) (noting that the argument that collateral estoppel should never be applied in deportation proceedings has been rejected, and explaining that the provision of the Act making the statutory procedure for deportation the sole and exclusive procedure for determining deportability of an alien does not preclude factual findings in a denaturalization proceeding from having collateral estoppel effect in a subsequent deportation proceeding).

PRIMARY ISSUE ON APPEAL

The respondent raises various arguments on appeal, some which are not necessarily consistent. For instance, the respondent appears to acknowledge that the doctrine of collateral estoppel could not be applied in this case to preclude relitigation of the factual issues underlying his alleged immigration fraud, as the district court declined to address this issue, but he also contends that a finding that he assisted in persecution was not necessary to the denaturalization judgment. Considering the two positions together, it is difficult to discern the basis upon which the

respondent believes the district court found his visa under the DPA invalid. In addition, the respondent indicates on the one hand that he may be a victim of misidentification while maintaining on the other that his service as a concentration camp guard was not voluntary and did not involve active participation in persecution. With his appeal, the respondent proffered additional evidence.

Having considered the arguments on appeal, though, as well as the relevant caselaw, we find the primary issue before us is relatively simple and can be framed as follows: did the Immigration Judge properly apply the doctrine of collateral estoppel to bar relitigation of the issues pertaining to the respondent's wartime service as an armed concentration camp guard? If so, summary judgment in favor of the Government was appropriate, because there were "no genuine issues of triable fact." United States v. Schmidt, 923 F.2d 1253, 1257 (7th Cir. 1991); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Kairys v. INS, supra; see generally Frye v. United Steelworkers of America, supra, (summary judgment granted because doctrine of collateral estoppel applied); cf, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 202 (1971) (finding in a case that did not involve collateral estoppel that summary judgment was inappropriate where review was based solely on litigation affidavits rather than the whole record).

II. THE USE OF COLLATERAL ESTOPPEL IS FAIR IN THIS CASE

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has stated:

> Given the full and fair judicial hearing to which an alien is entitled in a denaturalization proceeding, there is no reason not to apply the doctrine of collateral estoppel in a subsequent deportation proceeding to bar the relitigation of facts actually litigated and necessarily determined in the denaturalization case.

Kairys v. INS, supra, at 939 (citations omitted); see also Parklane Hosiery Co., Inc. v. Shore, supra, at 332 (finding no unfairness in applying collateral estoppel where there would be no procedural opportunities available to the petitioners that were unavailable in the previous action). Moreover, "when all factors required for collateral estoppel are present, it is the party opposing preclusion who must demonstrate that applying collateral estoppel in a specific case would result in particularized unfairness." Frye v. United Steelworkers of America, supra, at 1221 (citation omitted).

In this case, the respondent insists that the use of collateral estoppel is unfair for two reasons. The first is that he did not testify or present evidence at his denaturalization trial. The respondent argues that under the circumstances, the decision of the United States Court of Appeals for the Ninth Circuit in Title v. INS, 322 F.2d 21 (9th Cir. 1963), is controlling. We disagree.

A. Title

In Title, the Immigration Judge found that the alien was collaterally estopped from relitigating the issues underlying his deportability as a member of the Communist Party of the United States. The Immigration Judge therefore refused to

allow the alien an opportunity to present evidence on his own behalf during the deportation proceedings. The Ninth Circuit found that this application of the doctrine of collateral estoppel was unfair, because the alien, who did not testify or present evidence at his denaturalization trial, "may have proceeded differently" in light of the change in the law defining Communist Party membership. Id. at 24-25.

At the same time, however, the question of whether to give findings in a denaturalization proceeding collateral estoppel effect in a subsequent deportation proceeding is not generally discretionary, at least not in the Seventh Circuit. See Kairys v. INS, supra, at 940. In the instant case, the respondent does not dispute that he had a "full and fair opportunity" to litigate the issues in his denaturalization proceeding. Schellong v. INS, supra, at 658. Moreover, he identifies no change in the applicable law, and we are aware of none. Therefore, we do not believe that his refusal to testify at his trial is sufficient to defeat the purpose of collateral estoppel. See Parklane Hosiery Co., Inc. v. Shore, supra, at 326; see generally Kairys v. INS, supra, at 941 (rejecting a position that might encourage strategic maneuvering at a trial to make the future consequences of a judgment less costly for the losing party). We note in this respect that, while the respondent did not testify, the record reflects that, through counsel, he cross-examined witnesses and challenged the admissibility of evidence introduced by the Government, including the guard roster. In other words, this is not a case where the issues, including the factual issue of whether the respondent served as an armed concentration camp guard, were "determined by admissions and stipulations" rather than "actually litigated." Id. at 940. We

also point out that, contrary to the respondent's assertions on appeal, he was not precluded from presenting evidence before the Immigration Judge, and in fact, he did present evidence to oppose the Government's motion for summary judgment.

B. The New Evidence

This evidence forms the basis of the respondent's second reason for arguing that the use of collateral estoppel is unfair in these proceedings. Following the close of the denaturalization proceeding, the Government received a statement, dated March 22, 1991, from a survivor of the Mauthausen concentration camp who, starting in August 1943, spent about 5 months at the Gross Raming subcamp. The statement was translated November 14, 1991, and forwarded to the respondent on October 6, 1992. In his statement, the survivor relates that there were "Yugoslav SS" among the camp staff at Gross Raming, but indicated that he did not know their names. However, he described a person by the name of "Anton Tittjung" as a 35-year-old "civilian employee at one of the firms that hired prisoners," whereas according to the roster, the respondent before us was a 19-year-old guard in the Death's Head Battalion in July 1944. The survivor also described Anton Tittjung as a well-built man of medium height with dark red hair and hazel eyes, which differs from the description of the respondent provided on his immigration forms. Lastly, we note that according to the survivor, Anton Tittjung was a "sadist and a brute" who "had an especially bad reputation among the prisoners."

New evidence can prevent a denaturalization judgment from having collateral estoppel effect in deportation

proceedings, unless the record conclusively shows that the new evidence is immaterial. Id. at 941; see Applied Materials, Inc. v. Gemini Research Corp., 835 F.2d 279, 281 (Fed. Cir. 1987). The respondent relies on the case of Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), to argue that the survivor's statement is not only relevant, but requires that he be allowed to conduct discovery to determine whether the Government is in possession of any "additional exculpatory evidence" as to his identity. This argument is specious.

In addressing the argument, we note at the outset that "the Federal Rules of Civil Procedure are not applicable in deportation proceedings, and there is no requirement that a request for discovery be honored." Matter of Benitez, 19 I&N Dec. 173, 174 (BIA 1984); see Kulle v. INS, 825 F.2d 1188, 1194 (7th Cir. 1987); Matter of Khalifah, Interim Decision 3255, at 9 (BIA 1995); Matter of Magana, 17 I&N Dec. 111, 115 (BIA 1979). As for the survivor's statement, we find, as did the Immigration Judge, that it is at best irrelevant to these proceedings, and at worst inculpatory rather than exculpatory. The statement certainly provides no basis for concluding that it would be unjust to give the district court's denaturalization judgment collateral estoppel effect in this case, because it in no way detracts from the evidence establishing that, whatever else the respondent before us may have been, he was in the summer of 1944 an SS guard at Gross Raming, a sub-camp of the Mauthausen concentration camp.

We point out in this regard that Demjanjuk involved a different set of circumstances. Like the respondent, Mr.

Demjanjuk was charged with being ineligible for his visa under the DPA because of service as a concentration camp guard, but that is essentially where the similarities between their cases end. Mr. Demjanjuk was not accused of being just any guard; he was accused of being the notorious Ukrainian guard known as "Ivan the Terrible," and for this reason, he was extradited to Israel to stand trial on capital charges. As the court noted, the denaturalization and deportation orders against Mr. Demjanjuk were based primarily on his "failure to disclose his alleged wartime activities as 'Ivan the Terrible' at Treblinka," and "[t]he extradition order was based solely upon the district court's finding that Demjanjuk was Ivan the Terrible." Demjanjuk v. Petrovsky, supra, at 340.

The evidence identifying Mr. Demjanjuk as Ivan the Terrible came entirely from non-contemporaneous statements by eyewitnesses from Treblinka. However, the Government had more reliable evidence indicating that there was another Ukrainian guard by the name of Ivan and that the other, Ivan Marchenko, may have been Ivan the Terrible of Treblinka. In fact, while there was documentary evidence placing Mr. Demjanjuk as a guard at least at one other camp, Trawniki, his name, unlike Mr. Marchenko's, did not appear on lists of guards at Treblinka furnished by the Soviet and Polish governments. Such information should have been disclosed pursuant to interrogatories Mr. Demjanjuk had filed during the denaturalization proceeding and Fed. R. Civ. P. 26(e). Id, at 340, 350-51. In addition, the Government attorney had an "obligation to work for justice rather than for a result that favors [their] preconceived ideas of what the outcome of legal proceedings should be." Id. at 350. Nevertheless, due

in part to outside pressures, the attorneys acted with such "reckless disregard for the truth" that it amounted to "fraud on the court" by failing to produce the "exculpatory materials." Id. at 354.

The Government in this case, however, did not set out to prove that the respondent was "one of the most notorious perpetrators of Holocaust atrocities." Id. at 355. Rather, the Government was content to show that he was a member of the Death's Head Battalion serving at Mauthausen and its sub-camp Gross Raming. The evidence used to prove this was of the type that tended to disprove that Mr. Demjanjuk was even at Treblinka, namely, a list of guards. Incidentally, the list in the respondent's case was of greater reliability than those at issue in Mr. Demjanjuk's case in that, instead of being compiled by the Soviet government or the Polish government, it was an SS-prepared roster included in the report of the United States Army Major Eugene Cohen's official investigation of war crimes committed at Mauthausen and it subcamps ("Cohen Report"). United States v. Tittjung, supra, at 253.

The survivor's statement does not cast doubt on the reliability of the roster, which accurately provides objective biographic information regarding the respondent's rank, date of birth, and hometown. Indeed, it presents quite the reverse of the situation in Demjanjuk, because instead of being exculpatory, it suggests that there was an "Anton Tittjung" closer in character to Ivan the Terrible than previously indicated. At the very least, it confirms that there were SS guards at Gross Raming from Yugoslavia. As the survivor indicated that he did not know the guards' names, though, the

only reasonable explanation for his description of a person by the respondent's name is that either his memory was faulty and the civilian he knew decades earlier was not actually called "Anton Tittjung" or there were two people at the camp by that name. See generally Demjanjuk v. Petrovsky, supra, at 345-46 (indicating that non-contemporaneous statements are less probative than statements made closer in time to the events in question); United States v. Kairys, 600 F.Supp. 1254, 1260 (N.D. Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir. 1986) (finding contemporaneous documentary evidence more significant than recent witness identifications). We further note that, notwithstanding the respondent's claim that there exists a question as to his identity, he does not appear to deny the fact that he was a concentration camp guard.

We conclude that the denaturalization judgment was appropriately given collateral estoppel effect in these proceedings. To the extent that the respondent means to imply that the Government attorneys engaged in prosecutorial misconduct before the district court, as was the case in Demjanjuk, we note that we find no evidence whatsoever to support this charge.

V. ISSUES NECESSARY TO THE JUDGMENT

The respondent does not dispute that the district court found that he served as an armed concentration camp guard and there was ineligible for his visa under the DPA. Nevertheless, he contends that a finding that he assisted in persecution was not necessary to the denaturalization judgment. To support this position, the respondent cites Palciauskas v. INS, 939 F.2d 963 (11th Cir. 1991), in which

the court found that the Immigration Judge and the Board erred in applying collateral estoppel to preclude relitigation of the facts underlying a finding of deportability under the Holtzman Amendment.

Palciauskas is plainly inapposite in this case. The alien in Palciauskas was denaturalized on the grounds of concealment of a material fact and willful misrepresentation. The case involved evidence indicating that the alien may have had a role in the persecution of Jews while serving as the Mayor of Kaunas, Lithuania, from June 1941 to May 1942, but the district court found it unnecessary to resolve the persecution issue, because the fact that the alien had misrepresented his occupation during the war was in and of itself sufficient to support a finding that he had procured his citizenship illegally.

In contrast, it is readily apparent that the district court in Tittjung found it unnecessary to resolve the misrepresentation issue, because the fact that the respondent had served as an armed concentration camp guard necessarily meant that he had assisted in persecution for purposes of the DPA. United States v. Tittjung, supra, at 257. As noted above, the district court observed that "the Supreme Court established in *Fedorenko* that all concentration camp guards were ineligible as a matter of law for visas because they had assisted in the type of persecution proscribed by the DPA." United States v. Tittjung, supra, at 256-57 (emphasis added). Thus, we find that the issues conclusively established by the denaturalization judgment are, broadly stated, as follows: (1) the respondent served as an armed concentration camp guard; (2) as an armed concentration camp guard, he assisted in

persecution for purposes of the DPA; and (3) he therefore was ineligible for his immigrant visa.

VI. DEPORTABILITY

It follows from the foregoing that the Immigration Judge was correct in finding the respondent deportable under sections 241(a)(1)(A, (B), and (4)(D) of the Act. Specifically, with regard to the first two grounds, we note that the respondent was not eligible for his visa under the DPA at the time of his initial entry in 1952 and, consequently, was also not entitled to status as a returning immigrant when he reentered in 1955. These charges do not appear even to be seriously disputed on appeal. Instead, the respondent's arguments center on the Holtzman Amendment.

In Fedorenko v. United States, supra, at 512, the Supreme Court held that "an individual's service as a concentration camp armed guard - whether voluntary or involuntary - made him ineligible for a visa." The Court explained that the omission of the word "voluntary" from the definition of "displaced person" under the DPA "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." Id. However, to address the concern of the district court below that this interpretation of the term "assisted" could exclude survivors who had been forced to assist the SS in the operation of the camps, the Court added a footnote further explaining that the focus should be on:

> whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an

> individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle or a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about person who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems ...

Id. at n.34. Based on this footnote, the courts in three cases relied upon by the respondent held that a showing of some personal involvement in persecution was necessary to sustain a finding of assistance in persecution. See generally Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991) (holding that an alien was not deportable under the Holtzman Amendment where he served involuntarily as a camp civilian guard and never personally abused prisoners); United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985) (holding that passive accommodation of the Nazis by a Latvian police officer did not render him ineligible for a visa under DPA); Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985) (holding that under the Holtzman Amendment, the Government was required to prove that the alien had personally participated in the persecution of individuals and that willing membership in a movement was not sufficient).

Sprogis and Laipenieks both involved policemen and, thus, are easily distinguishable.[3] Indeed, the court in Sprogis expressly noted that the case fell "between the extremes of the death camp barber and the weapon wielding guard . . . ." United States v. Sprogis, supra, at 121. However, the respondent contends that the facts in Petkiewytsch "squarely mirror" the facts in his case.

The most significant shortcoming in this argument is that the respondent's case falls within the jurisdiction of the Seventh Circuit, which has repeatedly held that an alien who served as an armed guard at a Nazi concentration camp has assisted in persecution for purposes of the Holtzman Amendment. In doing so, the court has specifically rejected the position that proof of personal involvement in atrocities is required. Kairys v. INS, supra, at 942-43; Kulle v. INS, supra, at 1192; Schellong v. INS, supra, at 661; see also United States v. Schmidt, supra, at 1258-59 ("Whether or not Schmidt personally engaged in acts of violence, however, does not affect our conclusion that he assisted in persecution. . . . Service as an armed guard . . . ensured the systematic destruction of concentration camp inmates."); United States v. Kairys, 782 F.2d at 1378 (explaining that although the Supreme Court noted that "Fedorenko had testified to shooting in the direction of escaping prisoners, this was distinguish [sic] Fedorenko's position as a camp guard from those concentration camp survivors who were forced to

[3]We also emphasize that the decisions in United States v. Sprogis, supra, and Laipenieks v. INS, supra, are not controlling, because this case does not arise in either the Second Circuit or the Ninth Circuit.

perform tasks within the camp") (citation omitted). The court in Schellong noted:

> the purposes of [the DPA and the Holtzman Amendment] were identical: to exclude from the United States individuals who along with the Nazis had inflicted suffering on persons because of their race, religion, or political opinion. . . . Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aide the Nazis in their program of racial, political, and religious oppression.

Schellong v. INS, supra. In Kairys, the court further explained:

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Kairys v. INS, supra, at 943.

Like Kairys and Schellong, but unlike Petkiewytsch, the respondent's case involves the doctrine of collateral estoppel. Thus, it has been conclusively established by the

denaturalization judgment that the respondent served as an armed concentration camp guard. In addition, it has been conclusively established that the respondent assisted in persecution for purposes of the DPA. Therefore, the respondent has also assisted in persecution for purposes of the Holtzman Amendment.

We could end our discussion at this point, but in light of the consequences of finding the respondent deportable under section 241(a)(4)(D) of the Act, see Matter of Fedorenko, supra, we consider it worthwhile to address a second major flaw in his argument. Contrary to the respondent's assertion, Petkiewytsch is also factually distinguishable. Petkiewytsch involved a civilian guard at a labor education camp who, following the war, was apprehended by the British as a suspected war criminal, but then released "under 'category 5,' which meant that he was totally exonerated of any wrongdoing and of all charges." Petkiewytsch v. INS, supra, at 873. Therefore, it can be viewed as presenting "the difficult problem of where to draw the line." United States v. Sprogis, supra. In such cases, even the Seventh Circuit recognizes that "a showing of personal involvement in persecution may be necessary." United States v. Kairys, supra.

The respondent's case, in contrast, presents no "line-drawing problems." Fedorenko v. United States, supra. The respondent did not serve at a labor education camp, "the least restrictive type of Nazi detention camp." Petkiewytsch v. INS, supra, at 877. He served at the Mauthausen concentration camp and its subcamp Gross Raming. United States v. Tittjung, supra, at 253. The operation of the

concentration camps, including Mauthausen and Gross Raming, was "entrusted exclusively to the Death's Head Battalion of the Waffen SS. Id. at 254. As the court in Petkiewytsch itself observed, the SS concentration camps were the "most repressive" of the Nazi camps. Petkiewytsch v. INS, supra, at 873. At Mauthausen and Gross Raming, the prisoners included Jews, political opponents of the Nazis, and American prisoners of war. United States v. Tittjung, supra, at 254. "In all, thousands of prisoners died in Mauthausen as the result of shooting, gassing, hanging, electrocution, starvation, forced labor, lethal injection, and other forms of killing." Id. (citation omitted).

Moreover, the respondent was not a civilian and his duties can not be compared to cutting hair. He was in the Waffen SS and assigned to the Death's Head Battalion and, as such, he wore a skull and crossbones on the collar of his uniform. Id. at 253. His duties at Mauthausen and Gross Raming included "guarding prisoners to ensure that they performed forced labor and that they did not escape from the labor site; guarding prisoners in forced marches from the main camp to the subcamps; and guarding prisoners from the camp perimeter and its watchtowers to ensure that they did not escape." Id. (citation omitted). In addition, he was "under orders to shoot at any prisoner attempting to escape." Id. (citations omitted). During the period of his service, "the death toll at Mauthausen ranged from 200 to 300 per day in 1943, and from 350 to 400 per day in 1944," and of these deaths, at least 185 occurred at Gross Raming. Id. at 254 (citation omitted). Therefore, in this case, the requisite assistance in persecution may be "inferred from the circumstances." Kulle v. INS, supra, at 1193; see United

States v. Schmidt, supra; see also United States v. Breyer, 41 F.3d 884, 890 (3d Cir. 1994) (assistance in persecution found where the defendant "was a trained, paid, uniformed armed Nazi guard who patrolled the perimeters of two [concentration] camps with orders to shoot those who tried to escape") (emphasis added); Kalejs v. INS, 10 F.3d 441 (7th Cir. 1993) ("The Holtzman Amendment's non-criminal provision thus makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war."); see generally United States v. Stelmokas, 100 F.3d 302, 314 (3d Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1847 (1997) (noting that "while there is no eye-witness testimony identifying [the defendant] as a person who committed atrocities or otherwise persecuted the civilian population, the only reasonable inference to be drawn from the record is that he did exactly that"); United States v. Koreh, 59 F.3d 431, 442 (3d Cir. 1995) ("There need be no personal participation by the defendant in the commission of physical atrocities.").

In sum, this is not a close case. We find that the respondent's deportability under sections 241(a)(1)(A), (B), and (4)(D) has been established by clear, unequivocal, and convincing evidence as required by Woodby v. INS, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14. As an alien who assisted in the persecution of other persons on account of race, religion, nationality, membership in a particular social group, or political opinion, the respondent is not eligible for either asylum or withholding of deportation. See sections 101(a)(42)(B) and 243(h)(2)(A) of the Act, 8 U.S.C. §§ 1101(a)(42)(B), 1253(h)(2)(A); Matter of McMullen, 19 I&N

Dec. 90 (BIA 1984). His deportability under section 241(a)(4)(D) of the Act also renders him ineligible for relief under section 244 of the Act. See Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Fedorenko, supra. As no other form of relief is available, the Immigration Judge's order of deportation to Croatia was correct.

VII. THE RESPONDENT'S MOTION TO REMAND

The respondent requests that this Board consider the additional evidence, including an affidavit, that he has presented with his appeal. As the Board is an appellate body, Id. at 74, we construe his request as a motion for remand. Having examined the evidence, we note that much of the information in respondent's affidavit was not only available at the time of the Immigration Judge's decision, it could have been testified to at the respondent's denaturalization trial. Moreover, we find that even if the evidence were construed to be "previously unavailable" in these proceedings by virtue of the Immigration Judge's summary judgment, the motion must be denied, because the evidence would not change the result in this case. See Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

On the contrary, in his affidavit, the respondent admits that he served as a camp guard and was armed with a rifle. He claims that he was conscripted by the Germans because of his German heritage, that he served under duress, and that he never personally inflicted any abuse on any person, including the prisoners. However, as shown above, his service as an armed concentration camp guard, whether voluntary or involuntary, is itself sufficient to establish that he assisted in

persecution. See Fedorenko v. United States, supra; United States v. Breyer, supra; United States v. Schmidt, supra; Matter of Fedorenko, supra.[4] In any event, the respondent's claims in this regard pertain to issues that he is collaterally estopped from challenging. The remainder of the evidence relates to the respondent's requests for asylum and suspension of deportation, for which he is not eligible.

Accordingly, the appeal will be dismissed, and the motion to remand will be denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FOR THE BOARD

[4]We also point out that the respondent's self-serving statements regarding the voluntariness of his service are contradicted by evidence indicating that at the time the respondent joined the Waffen SS, "the SS had not yet reached an agreement with the government of Croatia on the conscription of ethnic Germans . . . ." United States v. Tittjung, supra, at 252-53 n.2.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
219 South Dearborn Street
Chicago, Illinois 60604

File: A8 315 083

IN THE MATTER OF:	)	
	)	
ANTON TITTJUNG,	)	
	)	IN DEPORTATION
Respondent.	)	PROCEEDINGS
	)	

Charges: Sec. 241(a)(4)(D), INA - - Participation of Nazi persecution.

Sec. 241(a)(1)(A), INA. - - Excludable at Entry.

Sec. 241(a)(1)(B), INA - - Presence in Violation of U.S. Law.

ON BEHALF OF RESPONDENT:

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ON BEHALF OF SERVICE:

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DECISION AND ORDER
OF THE IMMIGRATION JUDGE

This matter is before the court as the result of an Order to Show Cause in which Respondent is charged with being deportable on the above-referenced grounds. Respondent contests these charges. The government has filed a Motion for Summary Judgment, to which motion is appended a voluminous record. Respondent has filed his opposition to that motion. The matter is ripe for determination by the court.

PROCEDURAL HISTORY

Respondent is a 69 year-old male native and citizen of Yugoslavia. He entered the United States as a Legal Permanent Resident on or about May 24, 1952, at New York, New York, upon presentation of an Immigration Visa and Alien Registration, which was issued on or about April 11, 1952, by the American Consulate in Salzburg, Austria, pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, as amended on June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (hereinafter DPA). In 1974, Respondent was naturalized as a United States citizen.

On December 14, 1990, the United States District Court for the Eastern District of Wisconsin revoked and set aside Respondent's United States citizenship. United States v. Tittjung, 753 F.Supp. 251 (E.D. Wisc. 1990), aff'd 948 F.2d 1292 (7th Cir. 1991), reh'g denied, No. 91-1352 (7th Cir. 1992) available in 1992 U.S. LEXIS 4637. The government brought charges pursuant to Section 340(a) of the

Immigration and Nationality Act (hereinafter INA) as an alien who procured his naturalization illegally because of his service as a Nazi camp guard.

On or about May 11, 1992, the Immigration and Naturalization Service issued the Order to Show Cause herein, charging Respondent with deportability, in essence, for having assisted in persecution because of race or religion, for being ineligible for his visa because of his service as a camp guard, and for willfully misrepresenting his wartime activities in his visa application.

Respondent contests deportability and denies that he willfully misrepresented facts in obtaining his immigration status. He admits the action of the District Court in the denaturalization proceeding and that the court made the various findings of fact spelled out in the Order to Show Cause. He requests that if found deportable he be given discretionary relief in the form of suspension of deportation and/or asylum. He declines to designate a country of deportation pending resolution of the threshold question of deportability. Respondent interposes as his "affirmative defense" that there is no evidence: of the persecutory acts on his part; that he was ever inside any camp; or that, if he was, his conduct there was voluntary.

The government now seeks summary judgment based upon the record developed in the denaturalization proceeding. In support, the government tenders voluminous portions of that record. Respondent makes no objection to the admissibility of that record other than the failure of the government to tender the record in its entirety rather than

only in part. There is no requirement that a party moving for summary judgment provide more than that which is sufficient to demonstrate the propriety of disposition on the existing record. A party opposing summary judgment has an affirmative duty to indicate perceived deficiencies in the tendered record and to tender as evidence items alleged to demonstrate the necessity for non-summary resolution of the cause. Respondent makes no effort to challenge directly that which is tendered by the government. He objects only because it is not the entirety; he does not indicate what is missing that is relevant to these proceedings. Such an objection is insufficient; it is overruled. The record herein is, as a result, established as follows: the Order to Show Cause is designated as Exhibit 1. The denaturalization record (presented in five volumes which are cumulatively indexed and tabbed as items "A" through "ZZ") is designated as Exhibit 2. The book, Soldiers of Destruction, is designated as Exhibit 3. The concentration camp video is designated as Exhibit 4.

Respondent opposes summary judgment, not on the basis of the record from the denaturalization proceeding, but rather on the strength of evidence developed outside that record, which evidence he contends he should be allowed to present to a fact finder. This new evidence is a statement disclosed to Respondent by the government, which statement was obtained after the denaturalization judgment. In this statement, a survivor of the camps in question identifies Respondent and, according to Respondent, thereby creates discrepancies regarding identification, the resolution which requires evidentiary proceedings. The statement in question

is attached to Respondent's response to the summary judgment motion and is hereby designated as Exhibit 5..

The government takes the position that the denaturalization judgment established Respondent's deportability on all the charges and that he doctrine of collateral estoppel applies. They seek to estop Respondent from relitigating those issues which have already been decided in the denaturalization proceeding.

APPLICABLE LAW

Collateral estoppel is a doctrine which involves the conclusive effect in subsequent actions of judgments previously obtained. In collateral estoppel the subsequent suit involves a different cause of action. The effect given to the first judgment can be only in regard to issues that were actually litigated and which are pertinent to the cause of action in the subsequent suit. It is not operative to preclude a party in a second suit unless the point was actually litigated in the prior case and was necessary to the resulting decision. In order to have conclusive effect in a subsequent suit the issue decided in the firs suit must also have been on an ultimate or operative fact and not merely an evidentiary one. M. Green, Basic Civil Procedure, (2nd Edition), Chapter 8 at 234-36.

Under the doctrine of collateral estoppel, a prior judgment conclusively establishes the "ultimate facts" of any subsequent proceeding. An ultimate fact is one of those facts "upon whose combined occurrence the law raises the duty, or

the right, in question." Matter of Fedorenko, 19 I&N Dec. 65 (BIA 1984).

The following ultimate facts were established by the denaturalization judgment. United States v. Tittjung, 753 F.Supp. 251. These are, 1) Tittjung did serve as a guard at the Mauthausen concentration camp complex, 2) all concentration camp guards were ineligible as a matter of law for visas because the had assisted in the type of persecution proscribed by the DPA, and 3) Tittjung failed to obtain a valid visa to enter the United States.

RESPONDENT'S DEPORTABILITY

The right of aliens to a deportation hearing is adequately protected by the requirement the Respondent was given a full and fair opportunity to litigate in the prior proceeding, as well as the other requirements for application of collateral estoppel: (1) identity issues; (2) the issue be actually litigated and determined; (3) the issue be necessary to the judgment; and (4) the party against whom collateral estoppel operates was a party in the previous action. Schellong v. INS, 805 F.2d 655, 658 (7th Cir. 1986). As long as these factors are present and the doctrine's application will not be unjust, collateral estoppel may be applied do deportation proceedings. Id. Therefore, it is necessary to examine the facts established in the denaturalization suit against Tittjung to see whether they are sufficient to meet the requirements for deportation. Id. at 659.

The denaturalization judgment found by clear, convincing, and unequivocal evidence that Respondent

served as a guard in the Mauthausen concentration camp and its subcamp, Gross Raming. Tittjung, 753 F.Supp. At 256. In Fedorenko v. United States, 449 U.S. 490, 513-516 (1981), the Court established that all concentration camp guards were ineligible as a matter of law for visas because they assisted in the type of persecution proscribed by the DPA. This fact served as a basis for Tittjung's denaturalization. This fact may now serve as a basis for an order of deportation and should not be subject to relitigation. The requirements for the application of collateral estoppel are adequately established.

The voluntariness of Respondent's service in the German Waffen-SS is irrelevant. In Schellong, 805 F.2d at 660-61, the Court held that an individual who served as a guard thereby assisted in persecution. And in Fedorenko the BIA stated that Respondent's motivations for serving as a guard were immaterial to the question of his deportability. It was Congress's intent that all who assisted the Nazis in persecuting others must be deported. Id. at 70.

Respondent contends the new evidence should be presented to a fact finder. The survivor's statement is from a 77-year-old man who was in the Gross-Raming camp for about five months, beginning in August of 1943. His statements relates conditions at the camp. Included is reference to an individual from Yugoslavia identified as Anton Tittjung. He is described as dressed in civilian clothes but suspected by the prisoners of being actually SS. He is characterized as sadistic and cruel to the prisoners. The survivor describes this Tittjung as being about 35 years-old, with dark red hair, of medium height and well built, with

hazel eyes. Respondent contends that he, himself, was 19 years-old at the time. He also points out that his visa documentation shows his hair to be brown, his eyes to be gray, and his height to be 5'4" (Application for Immigrant Visa and Alien Registration). Respondent alleges that these are discrepancies which he should be allowed to present to the Court. This Court believes that the denaturalization judgment, based on the roster of guards in the concentration camp, properly authenticated, and identifying Respondent by name, and date and place of birth, provides more reliable evidence than the subjective inconsistency of eye and hair color attributed to the survivor. It is noted that Respondent's hair color was identified as "dark blond" in applying to immigrate to the United States (Questionnaire completed for the Army Counter Intelligence Corp) and as "brown" on his Application for Immigrant Visa dated August 19, 1955. On two application on the record his eye color is also inconsistent. Even if the substance of the statement be considered true, there is still reliable documentary and supporting testimonial evidence placing this Respondent, Anton Tittjung, as a guard in Gross Raming. Tittjung, 753 F.Supp. At 256.

The survivor's statement does not, in fact, contradict the evidence presented in the District Court, a forum in which Respondent enjoyed the full protection of the Federal Rules of Evidence and Federal Rules of Civil Procedure, and where he offered nothing to the contrary. That court determined only that Respondent was a camp guard. No atrocity was alleged or found. The survivor agrees there were uniformed Yugoslavian guards at the camp, but professes no knowledge of their names. To the extent that he is describing a different

"Anton Tittjung" or a third-party to whom he, in his effort to relate details now fifty years distant, erroneously attributes that name, his statement is deprived of relevancy in this case. To the extent that he is accurately describing respondent, his statement serves to corroborate the record placing Respondent at the camp and, further, to demonstrate Respondent's actual abuse of prisoners - - in clear contradiction of Respondent's "affirmative defense." To rely upon the survivor's statement is to remove Respondent from the frying pan of the District Court's factual findings and thrust him well and truly into the fire reserved for the active persecutor, the sadistic brutalizer of fellow human beings. Thus, if this "new evidence" proves anything beyond the previous record, it proves too much- -none of which is to Respondent's benefit.

As the court noted in Kairys v. INS, 981 F.2d 937, 941 (7th Cir. 1992), cert. denied, 113 S.Ct. 1832 (April 5, 1993). "It is not as if the [thumbprint] evidence stood alone. There was expert testimony that ... a person named [Kairys] was employed at [Treblinka] as the government contended..." Id. at 5. Likewise, there is abundant evidence from the denaturalization judgment to support the government's position, and the subject statement does noting to diminish the clear, convincing, and unequivocal nature of that which formed the basis for the District Court's findings. Respondent admits that those findings were made; it is entirely appropriate that this Court accept those findings as a basis upon which to resolve the issues before it. Based on those admissions, the record herein, and the doctrine of collateral estoppel, this Court finds that deportability has

been established by clear, unequivocal and convincing evidence. Woodby v. INS, 385 U.S. 276 (1976).

RELIEF FROM DEPORTATION

Respondent has anticipatorily requested the opportunity to apply for relief from any finding of deportability by means of suspension of deportation or in the alternative, asylum in the United States.

Section 244(a) of the INA, Suspension of Deportation provides in pertinent part:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(4)(D)) ...

Section 241(a)(4)(D) of the INA, provides as a basis for deportability, any alien who

> (D) Assisted in Nazi persecution or engaged in genocide.

The District Court found that Respondent's wartime service in a Nazi concentration camp placed him in the category of one who assisted Nazi Germany in persecution. Tittjung, 753 F.Supp. 257. This Court is proscribed from a grant of asylum to individuals in that category.

Also, 8 C.F.R. § 208.13(c) provides in pertinent part:

> (c) An applicant shall not qualify as a refugee if he ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion.

An individual's service as a concentration camp guard has been found to be assistance in persecution of others. Fedorenko, 449 U.S. at 512. This Court is bound to find that Respondent is barred from the relief of asylum by virtue of his participation in the persecution of others.

Thus, Respondent is precluded as a matter of law from being granted either Suspension of Deportation or Asylum. Likewise, there is no other form of relief for which he is eligible.

Accordingly, it is upon due consideration:

ORDERED that the question of deportability having been determined herein adversely to respondent, he shall, not later than April 29, 1994, file with this Court his written designation of his chosen country of deportation. Should Respondent fail to file such a designation, the Court will, without further notice or hearing, enter an order deporting Respondent to Croatia, the country having jurisdiction over the place of his birth.

DONE AND ORDERED this 25th day of March, 1994, at Chicago, Illinois (from Denver, Colorado).

G. MacKenzie Rast
U.S. Immigration Judge

UNITED STATS COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 9, 2000

Hon. William J. Bauer, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

ANTON TITTJUNG, Petitioner-Appellant,	]	On Petition for Review From the Board of Immigration Appeals
No. 98-3407 v.	]	No. A08 315 083
JANET RENO, U.S. ATTORNEY GENERAL, and the U.S. IMMIGRATION AND NATURALIZATION SERVICE, Respondents-Appellees.	]	

ORDER

On consideration of the petition for rehearing filed in the above-entitled case on January 18, 2000 by petitioner-appellant, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

U.S. Department of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A08 315 083 - Chicago Date: AUG 27, 1998

In re: ANTON TITTJUNG

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

William T. Regas, Esquire

ON BEHALF OF SERVICE:

Jeffrey L. Menkin
Trial Attorney
Office of Special Investigations
Criminal Division
Department of Justice

CHARGE:

Order: Sec. 241(a)(2)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] - Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(4)(D)] - In the United States in violation of law

Sec. 241(a)(4)(D), I&N Act [8 U.S.C. § 1251(a)(4)(D)] - Participated in Nazi persecution

APPLICATION: Reconsideration

ORDER:

PER CURIAM. The motion to reconsider is denied. The requests for a stay of deportation and for oral arguments are likewise denied.

Notwithstanding the respondent's contentions, we find no legal argument or aspect of this case that was overlooked by the Board in our prior decision. As we indicated, the respondent's deportability under section 241(a)(1)(A), (B), and (4)(D) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1)(A), (B), (4)(D), for having assisted in Nazi persecution amply supports the Immigration Judge's order of deportation against him. Therefore, it was unnecessary for either the Immigration Judge or the Board to determine whether the respondent is alternatively deportable under sections 241(a)(1)(A) and (B) of the Act on the basis of his alleged immigration fraud. See generally Kulle v. INS, 825 F.2d 1188, 1194 (7th Cir. 1987) (noting that an alien's excludability at entry for fraud provides "an independent basis for deportability" from that of his assistance of Nazi persecution). As no errors of fact or law in our prior decision have been identified, we decline to reconsider

our dismissal of the respondent's appeal in this case. See Matter of Cerna, 20 I&N Dec. 399 (BIA 1991), aff'd, Cerna v. INS, 979 F.2d 212 (11th Cir. 1992); 8 C.F.R. § 3.2(b)(1) (1998).

FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

DISMISSAL PER FRAP 42(b)

Date: November 26, 1997

By the Court:

No. 97-3790

ANTON TITTJUNG,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Board of Immigration Appeals No. A08-315-083

Upon consideration of the MOTION TO DISMISS filed by the petitioner on 11/21/97,

IT IS ORDERED that this cause is DISMISSED, pursuant to Federal Rule of Appellate Procedure 42(b).

(1181-102194)